U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 200 50093 Office: VERMONT SERVICE CENTER Date: JUN 15 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not adequately responded to his request for evidence. The director considered the petition as abandoned and denied it accordingly.[1] Because the director also found that the petitioner had failed to establish that the beneficiary possesses the necessary qualifications required by the regulations applicable to the admission of registered nurses under Schedule A, Group I, the AAO will address the merits of the petitioner's appeal.

On appeal, the petitioner, through counsel, submits additional information and asserts that the petitioner satisfied the applicable requirements for the position offered.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." "The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d).

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

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[1] There is no appeal from a denial based on abandonment. 8 C.F.R. § 103.2(b)(15).

The regulation at 20 C.F.R. 656.22(c)(2) also states:

> An employer seeking a Schedule A labor certification as a professional nurse (§656.10(a)(2) of this part) shall file, as part of the labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.[2] Application for certification of employment as a professional nurse may be made only pursuant to this §656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

In this case, the immigrant visa petition was filed on May 23, 2002. The ETA 750-A accompanying the petition establishes that the position of registered nurse pays $15.40 per hour. The director determined that the petitioner initially failed to submit sufficient evidence establishing that the beneficiary had either passed the CGFNS or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

On January 3, 2003, the director instructed the petitioner to submit evidence of the beneficiary's licensing credentials.

In response, counsel submitted copies of statutory provisions applicable to immigrant visa applicants and a copy of a letter from the Office of Examinations of the Service, now CIS, dated January 28, 1997. Counsel also submitted a copy of a Department of State cable. Counsel failed to submit any evidence showing that the beneficiary had passed any licensing examination or that she holds a state nursing license. Rather, counsel concedes that the beneficiary does not yet have the required credentials. Citing prior CIS policy, the Office of Examinations letter and the State Department cable, counsel asserts that a petitioner does not need to submit evidence of the beneficiary's passage of the CGFNS or NCLEX-RN examination, or show state licensure in conjunction with the submission of an I-140 based on an application for Schedule A labor certification.

The director denied the petition, finding, in part, that the petitioner had failed to establish that the beneficiary possesses the necessary licensure credentials. For the reasons discussed below, the AAO concurs and further notes that the record contains no evidence relating to the posting of the notice of the job opportunity and Application for Alien Employment Certification and no evidence of the petitioner's continuing financial ability to pay the proffered wage.

On appeal, counsel again asserts that I-140 is approvable without submission of the required licensure evidence. Counsel maintains that such evidence need not be produced prior to the beneficiary's appearance at a consular office or an adjustment hearing. Counsel states that prior CIS policy has permitted such a practice. In support of this claim, counsel resubmits the Office of Examinations letter and Department of State letter previously offered

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[2] On October 2, 2002, the Department of Labor advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. 656.22(C)(2) and advised the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

to the director. The AAO does not find counsel's assertions persuasive. If previous immigrant visa petitions have been erroneously approved under some prior interpretation of the law without regard to the alien's qualifications for a labor certification under the Schedule A, Group I procedures set forth in the applicable regulations, then this does not mandate future approvals. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International,* 19 I&N Dec. 593, 597 (Comm. 1988). It is further noted, that even if counsel's interpretation of a 1997 Office of Examinations letter accurately described its position, it does not supercede applicable law and is not binding on the AAO.[3] The applicable regulations expressly require that a petitioner seeking a Schedule A, Group I labor certification for a professional nurse files the application for Schedule A certification with the I-140. The Schedule A application must be filed with evidence that the alien has passed the pertinent CGFNS or NCLEX-RN examination, or holds a state nursing license. The 1997 Service letter provided by counsel focuses on grounds of exclusion and does not supercede pertinent regulations or subsequent guidance specific to I-140 adjudication issued by the Office of Adjudications.[4] This record does not contain evidence that the beneficiary has passed either the CGFNS or NCLEX-RN examination, or holds a state nursing license. Therefore, the petition cannot be approved. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

In view of the foregoing, the AAO cannot conclude that the director erred in finding that the petitioner has failed to establish that the beneficiary possesses the requisite credentials at the time of filing the visa petition.

It is further noted, that although the director's decision did not specifically focus on the lack of evidence of proper posting of the notice in accordance with the provisions 20 C.F.R. 656.20(g), the petition must also be denied on this basis. The evidence in the record failed to establish that the labor certification application was submitted with evidence that the notice of filing of the job opportunity and Application for Alien Employment Certification had been properly offered to the bargaining representative or posted in a conspicuous place at the facility or location of the employment. 20 C.F.R. § 656.20(g)(1)(i) and (ii). Additionally, the petition must fail because the record contains no evidence of the petitioner's continuing financial ability to pay the beneficiary's proffered wage in accordance with the requirements set forth in 8 C.F.R. § 204.5(g)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[3] *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the office of Adjudications* (December 7, 2000).

[4] *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).